

# Joint Declaration of the European Police Chiefs

## Lisbon Declaration

### Background

Mandatory data retention was harmonised in the EU in 2006 through Directive 2006/24/EC (Data Retention Directive). After the invalidation of the Data Retention Directive in 2014 by the Court of Justice of the European Union (CJEU), Article 15(1) of Directive 2002/58/EC (the e-Privacy Directive) provided the legal basis for national legislation concerning data retention for law enforcement purposes.

In this context, Member States either maintained, repealed or amended their national laws. The Data Retention Directive has not yet been adequately revised and put into effect.

The case law of the CJEU has led to significant restrictions regarding the retention of traffic and location data for the purpose of preventing, detecting or investigating criminal offenses, which presents a significant hurdle to Law Enforcement Agencies in fulfilling their duties, both domestically and in terms of international legal and law enforcement cooperation.

In brief, the CJEU issued the following relevant case law:

- In 2014, the CJEU in the Digital Rights Ireland case ruled that, while the retention of data genuinely satisfies an objective of general interest in the fight against serious crime, the Data Retention Directive did not meet proportionality requirements as the interference with fundamental rights was not limited to what was strictly necessary. Consequently, the DRD was declared invalid.
- In the 2016 ruling Tele2 Sverige AB, the CJEU confirmed that EU law, in particular the e-Privacy Directive, precludes national legislation that prescribes general and indiscriminate retention of traffic and location data. However, the CJEU made clear that the e-Privacy Directive does not preclude national legislation from imposing the targeted retention of data for the purpose of fighting serious crime, provided that such retention of data is limited to what is strictly necessary.
- On 6 October 2020, the Grand Chamber of the CJEU delivered its judgments on data retention concerning the British, French, and Belgian rules (Case C-623/17 (Privacy International), and Joined Cases C-511/18 (La Quadrature du Net and Others), C-512/18 (French Data Network and Others) and C-520/18 (Ordre des barreaux francophones et germanophone and Others)). Although the fact that the CJEU pointed out different solutions on data retention compliant with EU law (e.g. data retention of IP-Addresses, data retention in case of national threat situations), the referring courts raised doubts as to whether the case law deprives Member States of an instrument considered necessary to safeguard national security and combat crime.
- On 5 April 2022, in Case C-140/20 (G.D. v The Commissioner of An Garda Síochána), the CJEU confirmed its established case law that general and indiscriminate retention of traffic and location data relating to electronic communication is contrary to Union law even if it intends to combat serious crime. In the case at issue, a convicted murderer contested the use of evidence in the form of his traffic and location data in criminal proceedings and proceeded against the Irish provisions on data retention.
- On 20 September 2022, the CJEU ruled that the German legislation on data retention is incompatible with EU law (SpaceNet and Telekom Deutschland), although in comparison to other national legislation the scope of the retention and the retention period were limited.

By detailing exceptions from a general and indiscriminate (national) data retention regime, the CJEU has drafted a possible model for data retention at both the European and national levels.

These narrow exceptions include, but are not limited to: the targeted retention of traffic and location data which is limited, according to the categories of persons concerned or using a geographical criterion; the general and indiscriminate preventive retention in the field of national security, but limited in time to what is strictly necessary, where the Member State concerned is faced with a serious threat to national security, which is shown to be genuine and either existing or foreseeable; the general and indiscriminate retention of IP addresses assigned to the source of an internet connection; the general and indiscriminate retention of data relating to the civil identity of users of electronic communications systems; and the expedited retention (quick freeze) of traffic and location data in the possession of those service providers.

While several Member States have repealed national transposing data retention laws (mainly due to decisions of their respective Constitutional Courts), other Member States still apply the regime transposing the Data Retention Directive. A few countries have set up new legal regimes to comply with the CJEU case law.

Bearing in mind the current situation, we, Chiefs of Law Enforcement Agencies, wish to formulate the following:

#### **Considerations**

- We hold in high regard the judicial power reflected in the aforementioned decisions of the European Court of Justice;
- Our public service missions are carried out diligently on a daily basis in accordance with the rule of law, which includes national Constitutions and the EU Charter of Fundamental Rights;
- Our missions are grounded in the core principles of the EU Home Affairs and Justice area, with a focus on safeguarding the life and well-being of individuals and communities, respecting the diversity of cultures, traditions, and national identities;
- Our primary and enduring obligation is to ensure the protection of fundamental rights such as liberty, equality, data protection, security and justice, which we pledge to fulfil through each of our missions.

#### **Concerns**

The negative impact of the legal insecurity in the area of Data Retention implies, among others:

- In the absence of legal certainty of national legal frameworks on data retention, there is a risk that LEAs cannot access important evidence needed to identify, prevent, investigate and prosecute crimes. Existing differences in national laws seem to raise issues for cross-border cases, where LEAs face different procedures and retention periods between countries.
- Unclear and insufficient retention periods in the case of storage of data for commercial purposes. This is particularly problematic in countries that do not (in accordance with the rulings of the CJEU) have any legal obligation for service providers to retain non-content data, as LEAs cannot know with certainty what non-content data will be available and for how long.
- Access procedures are particularly challenging in cross-border investigations. Differences in national data retention regimes, types of data and retention periods, are the main obstacles to investigation and prosecution of cross-border crime.

- Quick freeze cannot replace data retention as it can only be applied from the moment a crime is detected or suspected and relies on data actually being stored by service providers.
- Existing technological challenges, such as the retention of dynamic IP addresses and related CGNAT issues, remain unsolved, while upcoming technological developments (such as 5G and IoT) will likely add complexity to some of the existing issues for non-content data retention.
- These negative impacts are cross cutting to all EU Members' States, Schengen associated countries, United Kingdom and beyond, in particular as concerns international cooperation;
- Human dignity, the foundational value of the Charter of Fundamental Rights of the European Union (article 1), calls for a deep reflexion vis-à-vis a meaningful and adequate balance between fundamental rights.
- Society is becoming increasingly digitalized and internationalized. International companies have a great influence on European citizens. To maintain safety and security and to prevent or detect serious crimes, it is important that international companies offering services in Europe are also obliged to retain data in accordance with the European legal framework.

**We, Chiefs of Law Enforcement Agencies,**

- Assume daily the responsibility of ensuring the protection of citizens' rights, freedoms and guarantees, while being fully scrutinized by society regarding our efficiency and performance quality;
- Flag these challenges, grounded in our expert knowledge, joint reflexion and field experience, to European and national institutions, giving our contribution to enable constructive solutions at the legislative, executive and judicial levels;
- Are particularly concerned about the national and international impact of the lack of an EU Data Retention regime for traffic and location data that affect not only the accomplishment of our missions but the whole of society, questioning the impact on citizens' rights, freedoms and guarantees and, consequently, on the democratic rule of law since some types of crimes can only be prevented and investigated if non-content data retention is allowed;
- Call for comprehensive work not only on data retention regime but also on access to data and data exploitation in order to get a new legal framework which restores confidence between LEAs, the private sector and citizens;
- Experience challenging times, with an increasing imbalance between the means and capacities abused by criminal organisations and our capacity to provide an operational and efficient response.

**Lisbon, 30 march 2023**

***Law Enforcement Agencies – Signatures (by country alphabetic order)***

<b>Country</b>	<b>Name</b>	<b>Position</b>	<b>Law Enforcement Agency</b>
<b>Austria</b>	Raimund Krendl	Head of Sub Department 1.1 - Organizational and Policy Matters	Criminal intelligence Service

**Signature**



Country	Name	Position	Law Enforcement Agency
<b>Belgium</b>	Marc de Mesmaeker	General Commissioner	Federal Police

Signature

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Country	Name	Position	Law Enforcement Agency
<b>Bulgaria</b>	Svetlin Lazarov	Head of Digital forensics and Cyber Intelligence	General Directorate Combating Organized Crime - Ministry of Interior

Signature

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Country	Name	Position	Law Enforcement Agency
<b>Croatia</b>	Antonio Gerovac	Assistant to the General Police Directorate and Head of the Criminal Police Directorate	General Police Directorate

Signature

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Country	Name	Position	Law Enforcement Agency
Cyprus	Stelious Papatheodorou	Chief of Police	Cyprus Police

Signed before the Commitment Session - Metadata Law Enforcement Conference



Country	Name	Position	Law Enforcement Agency
Denmark	Mikael Henrik Wern	Deputy Commissioner	National Special Crime Unit

Signed before the Commitment Session - Metadata Law Enforcement Conference

**POLITI**

Country	Name	Position	Law Enforcement Agency
Estonia	Leho Laur	Deputy Director general Head of Economic Crime Bureau and Acting Head of the National Criminal Police	Police and Border Guard Board

Signature



Country	Name	Position	Law Enforcement Agency
Finland			National Police Board

Signed digitally after the Commitment Session - Metadata Law Enforcement Conference

 **POLIISI**

Country	Name	Position	Law Enforcement Agency
France	Thierry De Wilde	DGPN/CAB/Conseiller AEI	Police Nationale

Signature

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Country	Name	Position	Law Enforcement Agency
France	Olivier Alary	International and European affairs senior advisor - Colonel	French National Gendarmerie

Signature

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Country	Name	Position	Law Enforcement Agency
Germany	Martina Link	Vice-President	Federal Criminal Police Office - BKA

Signature

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Country	Name	Position	Law Enforcement Agency
Greece	Dimitri Mallios	Police Major General	Hellenic Police

Signature

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Country	Name	Position	Law Enforcement Agency
Hungary	Aron Jeney	Director	National Bureau of Investigation

Signature

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Country	Name	Position	Law Enforcement Agency
Ireland	Michael McElgunn	Assistant Commissioner	Guarda National Crime & Security Intelligence Service

Signature

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Country	Name	Position	Law Enforcement Agency
Italy	Vittorio Rizzi	Deputy General Director of Department of Public Security	Criminal Police Central Directorate

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Country	Name	Position	Law Enforcement Agency
Latvia	Armands Ruks	Chief of the State Police	State Police

Signature

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Country	Name	Position	Law Enforcement Agency
Lithuania	Marius Draudvila	Deputy Police Commissioner General	the Ministry of the Interior Police Department

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Country	Name	Position	Law Enforcement Agency
Luxembourg	Philippe Schrantz	Director General	Police Grand-ducale

Signature

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Country	Name	Position	Law Enforcement Agency
Malta	Angelo Gafa	Commissioner of Police	Malta Police Force

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Country	Name	Position	Law Enforcement Agency
The Netherlands	Jannine van den Berg	Deputy Commissioner International Police Cooperation	The Netherlands Police

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Country	Name	Position	Law Enforcement Agency
Norway	Erik Marthinussen	Head of Prosecutions and Legal Affairs Department	NCIS

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Country	Name	Position	Law Enforcement Agency
Portugal	Luís Neves	National Director	Polícia Judiciária

Signature

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Country	Name	Position	Law Enforcement Agency
Romania	Ciprian Antohe	Deputy Director of Directorate for Special Operations	Romanian Police

Signature

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Country	Name	Position	Law Enforcement Agency
Slovenia	Senad Jušić	Acting Director General of the Police	Republic of Slovenia Police

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Country	Name	Position	Law Enforcement Agency
Spain	Francisco Pardo Piqueras	Police General Director	Spanish National Police

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Country	Name	Position	Law Enforcement Agency
Spain	María de las Mercedes González Fernández	General Director	Guardia Civil

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Country	Name	Position	Law Enforcement Agency
Sweden	Tobias Bergkvist	Police Commissioner, Head of Investigations Division, National Operations Department	Swedish Police Authority

Signature

